

TESTIMONY OF THE SAN FRANCISCO PUBLIC UTILITIES COMMISSION
TO THE STATE WATER RESOURCES CONTROL BOARD,
BAY DELTA WORKSHOP NO. 3

JUNE 14, 1994

The San Francisco Public Utilities Commission ("San Francisco") submits the following testimony to the State Water Resources Control Board ("Board") at this third workshop concerning the development of standards for the protection of the Bay-Delta estuary (Delta).

San Francisco is a member of the California Urban Water Agencies (CUWA) and the Bay Delta Urban Coalition, both of which have in the past submitted comments to the Board concerning Delta issues. San Francisco endorses the testimony of CUWA concerning issues 1 and 4 of the Board's notice for this third workshop.

Issue no. 3 of the Board's notice requests comments to the issue of "What effect do upstream water projects, other than the CVP and SWP, have on the fish and wildlife resources of the Bay-Delta Estuary?" San Francisco joins in the testimony of the Bay-Delta Urban Coalition concerning this issue. San Francisco's endorsement of the Urban Coalition's position is not meant as a waiver of its legal rights concerning the Board's jurisdiction over its water rights, other legal entitlements, or its operations. The Board should refer to San Francisco's testimony in the D-1630 proceedings in which the City set forth its legal position regarding the Board's jurisdiction. (See Legal Brief Of The Public Utilities Commission Of The City And County Of San Francisco In The Interim Water Rights Hearing For The Water Rights Phase Of The Bay-Delta Hearings).

The testimony of the Urban Coalition recognizes that the effect on the fish and wildlife resources of the Delta by upstream water users may not be addressed in a uniform response. There are many differences among the effects which the upstream water projects may or may not have. These effects will have to be considered in any Delta solution.

In fashioning a Delta solution, there is no question but that the State Water Project and the Central Valley Project are in the first instance responsible for meeting Delta water quality requirements. The so-called "Racanelli" decision does not require a different result. At a minimum, impacts caused by these users must be mitigated by these users. However, San Francisco also recognizes that there are impacts caused by others which may require the development of an allocation plan which spreads responsibility to a broader community of water users. By the same token, there are legal, scientific, and public policy considerations which will serve to modify any Board decision, consistent with the most reasonable and beneficial use of water.

If a spreading of responsibility is required, the Board must avoid any approach that is based on an across-the-board sharing formula such as tributary unimpaired flow percentages or reservoir storage capacities as suggested in D-1630. Perhaps Senator Dianne Feinstein said it best in her letter of November 30, 1993 to Interior Secretary Babbitt, that is, by "assigning responsibility on a rational basis for solutions to specific problems rather than simply increasing gross water outflows for environmental purposes."

Any decision by the Board which seeks to allocate responsibility to meet water quality objectives and flow requirements must give due consideration to factors such as water rights seniority and priorities of use, benefits and detriments associated with a water user's activities, relative benefits derived from that use, conservation efforts, impacts of shortages, availability of alternative sources, and such other factors that will arrive at an allocation plan which will best protect the public interest in the reasonable and beneficial use of water.

Any decision by the Board should also recognize that the activities of upstream and in-Delta water users have had impacts which are both positive, as in the case of the release of water from reservoir carryover storage for fishery protection during periods of low flow and maintenance of flows for recreational uses, and negative, the impacts of which have been cited many times to this Board and are not necessary to repeat here.

From a strictly legal viewpoint, there are tremendous hurdles which may be impossible to overcome to effectively spread responsibility for providing Delta protection among all water users. Further, a purely scientific allocation of responsibility, based upon a measurement of cumulative impacts, would not be consistent with parties' legal rights, and from a practical perspective, will take a great deal of effort to develop.

There are many entities participating in these workshops that find themselves in either similar legal or practical positions as San Francisco. Many of us are senior water rights holders, some of us are entitled to preference based upon our priority of use as municipal water suppliers, and for many, there has been no comprehensive quantification of the impacts, if any, of our actions on the fish and wildlife resources of the Delta.

Another position common to several of the upstream water users is recognition of the need to resolve the Delta problems. To this end, San Francisco has been working with many other entities to develop a conceptual framework for the spreading of responsibility for meeting Delta protection beyond the state and federal water projects. While we know of know no entity that has endorsed any proposal at this time, many of us are interested in exploring the opportunity of a negotiated, equitable solution to the Delta problems. In an effort to move this discussion forward, San Francisco would like to introduce a conceptual proposal for the Board's consideration of a Delta solution.

San Francisco proposes a three-tiered approach. First, the Board will have to establish a benchmark against which to measure the parties' responsibilities for Delta protection. Second, the Board will have to adjust this benchmark consistent with factors related to the water user's seniority, priority, and other considerations. The first tier must be adjusted by the factors in the second tier in order to legally allocate responsibility among water users. (see *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal.App.3d 548, 553-54 (1990); *United States v. SWRCB*, 182 Cal. App. 3d 129-130, 131 n. 25 (1986); *People v. Forni*, 54 Cal App. 3d 743 (1976).) Therefore, the Board cannot simply allocate based on an across-the-board formula, but, as stated, must adjust each user's responsibility in relation to their legal rights and other identified factors.

In the third tier, the Board must recognize that there are situations in which not all water users will be able to meet their assigned responsibility directly without causing unreasonable economic or environmental impacts. To this end, the development of "mitigation credits," which will allow a party to substitute an alternative in lieu of its mandated actions, is essential to any Delta solution. In more detail, our proposal is as follows.

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First Tier - Creation of the base.

The first step to developing an equitable division of responsibility for compliance of water quality standards is the identification of one or more physical parameters that best relate to the specific water quality standard. For instance, regarding the provision of outflow for compliance to an X2 water quality requirement, the base parameter would be streamflow and the factors that affect Delta outflow. Another example would be water quality objectives for the San Joaquin River. In this instance the causative parameter is agricultural drainage. Therefore, drainage discharges should be the parameter that is used to establish responsibility. Each specific water quality objective may be similarly linked to a physical parameter. (There exists significant information that reduction in flow alone cannot singularly be identified as the sole contributor to the decline of estuarine health. Within this discussion, the intent is not to imply that flow is the sole cause of the decline of estuarine health.)

Once the base parameter has been identified, the appropriate community of water users that have an effect on the meeting of the water quality standard must be identified. In the instance of X2 for example, all water users that affect outflow may be required to share responsibility.

Net depletions from the Bay-Delta watershed of each user may be the appropriate parameter to initially base a user's responsibility for X2 outflow, and the community of water users that deplete the water resources of the Bay-Delta watershed should be responsible. This community of water users includes diverters of surface waters which are tributary to the Bay-Delta watershed, the in-Delta water users, and ground water users that tap aquifers that hydraulically connect to the surface waters of the Bay-Delta watershed. This community of water users also includes entities that deplete Bay-Delta outflow by evaporation losses from reservoirs, such as power utilities. Net depletion is suggested to be the physical parameter that is used to initially determine responsibility since it represents the actual extraction of water from the watershed which would otherwise ultimately become outflow.

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Second Tier - Allocation Factors

Once a base amount is established, legal, physical and public interest allocation factors must be applied to each water user to determine how, or whether to adjust the base. The allocation factors are conceptual in nature at this time. A relative impact assessment or multiplier formula would be attached to each of the factors in creating the equation for Delta responsibility. Further, it is likely that the Board would have to exercise its judgment in the application of certain of these factors to further the public interest.

The following factors may reduce an allocation initially attributed to an individual user to arrive at the net responsibility for providing Delta protection. Appropriate factors include, but are not limited to:

Seniority of right
Priority of use
Area of Origin
Timing of Diversions
Storage Releases for Public Trust Uses
Conservation
Drought Management Plans
Reclamation
Reuse
Conjunctive use
Low per capita or acre foot/acre use
Pricing policies
Economic output produced
Recreational benefits
Public Interest

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The following factors may increase an allocation initially attributed to an individual user to arrive at the net responsibility for providing Delta protection. Appropriate factors include, but are not limited to:

- Entrainment
- Reverse Flows
- Pollution
- Timing of Diversions
- Degree of Nexus Between Upstream Action and Impact on Delta Fish & Wildlife
- Impact on Upstream Biological Resources with Significance to the Delta
- Impact on Drinking Water Quality
- Impact on Disinfection Byproducts (e.g. THMs)
- Temperature Increases
- Destruction of Wetlands
- Destruction of Riparian Habitat
- Available Alternative Sources of Water
- High Per Capita or Acre Foot/Acre Use
- Failure to adopt BMPs or EWMPs
- Artificially low pricing
- Low-value economic output
- Inadequate water management
- Public Interest

Third-Tier: Mitigation Credits

An important component of the allocation factors equation is the reality that under certain circumstances it will be unreasonable to require a water user to directly meet all or a portion of its responsibility for Delta protection with actions such as the release of water, cessation of diversions or ground water pumping, and yet, the Delta will be in no less need of protection. Therefore, a system of mitigation credits is proposed which will allow a water user to meet its responsibility for Delta protection by providing that protection through alternative means in lieu of the requirement otherwise imposed.

Generally, mitigation credits should be available to any type of water user. Urban water users and agriculture water users could avail themselves of the mitigation credits program to meet their obligations, provided credits are available and the appropriate regulatory authority deems it reasonable to allow the

user to substitute a mitigation credit. The mitigation credit program should be consistent with an overall multi-species protection plan developed for the Bay-Delta watershed.

Examples of mitigation credits may include, but are not limited to:

- The provision of water from another source in lieu of a required reservoir release.
- Cessation of pumping in one location in exchange for pumping elsewhere.
- The payment of money to a fund for the purchase of water.
- The creation of wetlands or other environmentally beneficial projects in exchange for the otherwise mandated action, again based upon a finding of equivalent benefit to fish and wildlife.

Conclusion

This implementation proposal has been designed as a conceptual framework for allocating responsibility to meet Delta protection requirements. We look forward to working with the Board and other water users to refine this proposal during the weeks and months ahead. Given the number of water users that have expressed interest in the concept as presented we believe the Board should invest its energies in pursuing this proposal as a potentially viable basis for resolution of at least a portion of the Delta's problems.

RESPECTFULLY SUBMITTED.

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